Supreme Court, U.S.
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No. 98-389

In The

Supreme Court of the United States

October Term, 1997

JOHN AND PATRICIA GLAVARIS; BENNY L. TOLLEY; JOEL BINDER; MARIT FIDEL; BERNARD FIDEL,

Petitioners,

vs.

HERBERT J. YOUNG; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Gibson, Dunn & Crutcher LLP is a California limited liability partnership that has no parent company, subsidiaries or affiliates.

Respondents Herbert J. Young, James N. Thayer, Jay Janis, John R. Williamson, Michael W. Mooney, Lynne Crawford, Linda K.S. Blount, Robert R. Sprague, Houston I. Flournoy, Bernice H. Hutter, Melvin P. Spitz and Rafael E. Vega have no parent companies, subsidiaries or affiliates.

Respondents Gibson, Dunn & Crutcher LLP, Herbert J. Young, James N. Thayer, Jay Janis, John R. Williamson, Michael W. Mooney, Lynne Crawford, Linda K.S. Blount, Robert R. Sprague, Houston I. Flournoy, Bernice H. Hutter, Melvin P. Spitz and Rafael E. Vega respectfully submit this opposition to petitioners John and Patricia Glavaris, Benny L. Tolly, Joel Binder, Marit Fidel and Bernard Fidel's Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to the statutes and rules cited in the Petition, the following California statutes are involved in this case, as they form the basis for the district court's decision (affirmed by the Ninth Circuit) that certain of the federal and state claims asserted in the complaint were time-barred:

California Code of Civil Procedure § 335

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

California Code of Civil Procedure § 338(d)

> "Within three years:
>
> (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

California Code of Civil Procedure § 339

> "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing. . . ."

California Corporations Code § 25506

> "No action shall be maintained to enforce any liability created under [certain provisions of the Corporate Securities Law of 1968] unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire."

REASONS FOR DENYING THE WRIT

The Petition raises no federal issues worthy of this Court's consideration. The Ninth Circuit's unpublished memorandum decision neither decided any novel federal questions nor conflicts with any decision of another circuit. The Ninth Circuit simply affirmed the district court's rulings, contained in two lengthy, fact-bound and similarly unpublished memoranda decisions (*see* Appendix 1d-78d, 1e-117e) "for the reasons set forth by the district court" without itself articulating *any* rules of law. *See* Ninth Circuit's Memorandum filed Feb. 19, 1998 at Appendix 4a. For this reason alone, and for the following additional good reasons, the Petition should be denied.

- The primary issue raised below and in the Petition — *i.e.*, whether the district court correctly dismissed petitioners' federal securities law claims based on the statute of limitations — is moot. This case, brought for violations of Section 10(b) of the Securities Exchange Act of 1934, was filed on

November 16, 1990, before this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Accordingly, the *Lampf* statute of limitations did not apply to petitioners' federal securities fraud claims.[1] *See* 15 U.S.C. § 78aa-1. The district court therefore correctly followed applicable Ninth Circuit precedent by applying California's three year state law limitations period (Cal. Code Civ. Proc. § 338(d)) to this action. Because the *Lampf* statute of limitations — rather than California's three year fraud period of limitations — applies to all private civil actions commenced under Section 10(b) after June 19, 1991, review by this Court of the district court's application of the California state law statute, and the Ninth Circuit's affirmance thereof, would have no precedential value whatsoever.

• Petitioners' request that this Court review the district court's decision to re-define the class period into subclasses is not worthy of review for two reasons. First, Federal Rule of Civil Procedure 23(c)(4)(B) expressly authorizes district courts — and authorized the district court here — to subdivide the class period based upon the court's analysis of the particular facts of this case. *See* Fed. R. Civ. P. 23(c)(4)(B) ("When appropriate . . . a class may be divided into subclasses and each subclass treated as a class. . . ."). *See also* Memorandum of Decision filed Sept. 10, 1992 at Appendix 20d-25d (analysis of petitioners' "fraud on the market" theory of reliance and the significant interim public disclosures during the purported class period in this case). Second, this Court and the circuit courts have uniformly held that a district court may split a proposed class into subclasses when the facts and circumstances suggest that doing so would be appropriate.[2]

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1. Petitioners do not contend otherwise.

2. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980) (district court may consider appropriateness of subclasses, but has (Cont'd)

The district court here applied these settled principles of law to the factual allegations of petitioners' complaint. There is no reason for this Court to reconsider this fact-bound question.

- Petitioners' contentions (a) that they were entitled to tolling under this Court's *American Pipe* doctrine[3] (*see* Petition at i) and (b) that Messrs. Binder and Fidel should have been permitted to intervene in this case to resurrect claims dismissed by the district court (*see* Petition at 17) are not worthy of review. In deciding these two questions, the district court merely applied settled rules of law to the facts and circumstances of this case. *See* Second Memorandum of Decision filed Aug. 11, 1994 at Appendix 49e-55e, 75e-87e. Petitioners make no showing to the contrary. Because petitioners' only assertion of error consists of the district court's (and the Ninth Circuit's) purported misapplication in this unique case of settled legal principles, the Petition does not satisfy any of the criteria which would justify granting review on certiorari. *See* Supreme Court Rule 10.

- The Ninth Circuit's decision in this case does not, as petitioners assert, conflict with a decision of the Third Circuit Court of Appeals concerning the requirements for pleading the existence of a RICO "enterprise." *See* Petition at 26-27;

(Cont'd)
no *sua sponte* obligation to do so). *See also In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 935 (9th Cir. 1996) (treating subclasses differently for statute of limitations purposes because different market conditions existed at various times during the purported class period); *Lundquist v. Security Pac. Automotive Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993); *Mendoza v. United States*, 623 F.2d 1338, 1350 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 253 (3d Cir. 1978), *vacated on other grounds*, 445 U.S. 388 (1980); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57, 58 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970).

3. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

18 U.S.C. § 1961(4). The Ninth Circuit affirmed the district court's dismissal of petitioners' RICO claims without even mentioning the RICO "enterprise" issue. Accordingly, this is hardly an appropriate case for this Court to consider the pleading requirements for a RICO "enterprise."[4]

- The remaining issues raised by petitioners assert error with respect to (a) the district court's fact-bound analysis of the allegations of petitioners' 154 page Second Amended Complaint, (b) the district court's fact-based conclusion that petitioners failed adequately to plead a cause of action for violation of Section 10(b) or for state law fraud or negligent misrepresentation, and (c) the district court's application of state law concerning inquiry notice, fiduciary duty, fraudulent concealment and equitable estoppel. None of these fact-specific questions, and in particular none of the California state law issues decided in this case, satisfy Rule 10 criteria.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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4. Petitioners are also incorrect in their assertions (*see* Petition at 26 n. 16) that "[p]rior to [this case], the Ninth Circuit had not previously had the occasion to address [the RICO enterprise] issue" and that the Third Circuit subscribes to a different approach. *See Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996) (adopting majority view that a RICO enterprise must "have an ascertainable structure separate and apart from the pattern of racketeering activity in which it engages"); *United States v. Pelullo*, 964 F.2d 193, 211-12 (3d Cir. 1992) (same). Indeed, *Chang* expressly adopts the RICO enterprise pleading requirements set forth by the Third Circuit in *United States v. Riccobene*, 709 F.2d 214 (3d Cir.), *cert. denied*, 460 U.S. 849 (1983). *See Chang*, 80 F.3d at 1299.

Dated: September 30, 1998

Respectfully submitted,

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